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In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

JOHN E. MOSS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a)[1] is reported at 502 F. 2d 461. The initial order (No. 455) of the Federal Power Commission (Pet. App. 31a-51a) and its order (No. 455-A) denying rehearing (*id.* at 52a-57a) are reported at 48 FPC 218 and 48 FPC 477, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a) was entered on August 15, 1974, and the Commission's timely petition for rehearing was denied on

[1] "Pet. App." refers to the appendix to the Commission's petition for a writ of certiorari.

September 19, 1974 (*id.* at 29a–30a). On December 12, 1974, the Chief Justice extended the Commission's time for filing a petition for a writ of certiorari to and including January 17, 1975. The petition was filed on that date and was granted on June 16, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission may, upon a proper finding of public need, simultaneously authorize both the sale of natural gas in interstate commerce by a producer and the abandonment of the sale at a future date certain.

STATUTES INVOLVED

Sections 4, 5, 7, and 16 of the Natural Gas Act, 52 Stat. 822–825, 830, as amended, 15 U.S.C. 717c, 717d 717f, and 717*o* are set forth in the appendix to this brief, *infra*, pp. 25–33.

STATEMENT

1. On August 3, 1972, the Federal Power Commission, as part of its continuing effort to alleviate the worsening shortage of natural gas, issued Order No. 455 (Pet. App. 31a–51a) establishing an "optional procedure for certificating new producer sales of natural gas" (*id.* at 31a). The procedure is designed to "stimulate and accelerate domestic exploration and development of natural gas reserves" (*id.* at 38a) by permitting the Commission to "certificate sales of gas not previously deliverable to the interstate market at

prices which are shown to be in the public interest" and to "lessen rate uncertainty which has prevailed since the early 1960's" (*id.* at 32a).

The Commission found that natural gas producers were frequently unable to rely upon the rates established by the Commission in its area rate orders, because those orders were subject to lengthy appellate review. "Consequently there is no assurance at the present time that a producer may not ultimately have to refund some of an initial rate * * * upon which the producer relied when it dedicated a new gas supply to the interstate market" (*id.* at 35a–36a). "This uncertainty," the Commission found, "has impeded exploration and development" (*id.* at 36a). "[T]he producer does not know * * * how much it will get if it develops and sells new gas to the interstate market. The producer knows for sure only that once it sells in interstate commerce it cannot stop deliveries" (*ibid.*).

Under the optional procedure established by Order No. 455, producers may tender for the Commission's approval contracts for the sale of new natural gas at rates that may exceed the maximum authorized by the applicable area rate order (*id.* at 46a).[2] The Com-

[2] On June 21, 1974, the Commission established a uniform national ceiling rate, superseding the area ceiling rates, for sales of natural gas produced from wells commenced on or after January 1, 1973, or newly dedicated to the interstate market on or after that date (Opinion No. 699, pending review *sub nom. National Rate Cases for New Gas, Shell Oil Co., et al.* v. *Federal Power Commission*, C.A. 5, Nos. 74–3330, *et al.*). The Commission thereafter issued Order No. 455–B, which, *inter alia*, amended the optional certificate procedure to permit the tendering of contracts in which the rates exceed the applicable area *or national* ceiling rates.

mission may then determine in a single proceeding whether the "public convenience and necessity" under Section 7(c) of the Act, 15 U.S.C. 717f(c), warrants the issuance of a certificate authorizing the sale and whether the rates called for by the contract, including any definite increments during the life of the contract, are "just and reasonable" under Section 4(a), 15 U.S.C. 717c(a) (*id.* at 47a, 57a). A permanent certificate issued by the Commission and accepted by the producer is not subject to change in later proceedings under Section 4 of the Act, 15 U.S.C. 717c, and the rates may be collected without risk of refund obligations (*id.* at 39a, 46a).[3]

At the time that it issues a permanent certificate of public convenience and necessity under the optional procedure, the Commission may also authorize the producer—upon appropriate findings of public need under Section 7(b) of the Act, 15 U.S.C. 717f(b)—to abandon the sale at the end of the contract term (*id.* at 46a, 55a). In that event, the producer would be free when the contract expires to discontinue deliveries to the original purchaser without having to demonstrate again that abandonment is consistent with the public convenience and necessity. Pregranted abandonment authority thus would give a producer assurance that his present sale will not in-

[3] The Commission recognized that it "cannot bind a future Commission not to invoke the *prospective* operation of Section 5" of the Act, 15 U.S.C. 717d, to alter the rates called for by the contract (Pet. App. 36a; emphasis added). It stated, however, that, "[t]o the extent that this Commission can grant certainty of rates, we do so" (*ibid.*).

definitely commit the gas to what may be a lower-priced interstate market.

In return for the rate certainty (and, in some cases, abandonment assurance) made possible by Order No. 455, a producer who accepts a permanent certificate issued under the order "waive[s] all rights to seek future rate increases under Section 4 * * *, other than price escalations" called for by the contract and certificated by the Commission (*id.* at 47a), and waives his right to benefit from any contingent escalations of the price of flowing gas provided for under the applicable area rate order (*id.* at 43a–44a, 47a).[4] In addition, the contract may not contain certain indefinite price escalation clauses (*id.* at 47a).[5]

2. Petitions for review were filed attacking the optional procedure on a variety of grounds. The court of appeals, however, upheld the Commission's order in all respects save one (*id.* at 1a–27a). It held that the order did not abandon the statutory "just and reasonable" standard for consideration of proposed rates under the optional certificate procedure (*id.* at 8a–11a); that the Commission may at the outset properly review and approve as just and reasonable both an initial rate and any fixed rate escalations provided for

[4] The validity of contingent price escalations for the Southern Louisiana producing area was upheld by this Court in *Mobil Oil Corp.* v. *Federal Power Commission*, 417 U.S. 283. The mechanics of the escalation provisions were described in the Court's opinion (417 U.S. at 298–299, n. 16).

[5] A common feature of contracts filed under the area rate procedures, for example, is an "area rate clause" that permits the seller to increase its rates to reflect increases in the applicable area maximum rate levels.

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in the contract (*id.* at 11a–14a); and that the Commission may, pending final action on an application, properly authorize the temporary delivery of gas under a contract at the prevailing area ceiling rate for a period of six months, and at the contract rate thereafter, without subjecting the producer to the risk of refund obligations (*id.* at 14a–16a).[6]

The court set aside the Commission's order, however, insofar as it provides that the Commission may, at the time it issues a certificate of public convenience and necessity, authorize the producer to terminate the sale at the end of the contract term (*id.* at 20a–21a). Such pre-granted abandonment, the court held, would violate Section 7(b) of the Act, 15 U.S.C. 717f(b), which prohibits the abandonment of any jurisdictional service or facility, except when the Commission has first given its approval upon a finding either that the available supply of natural gas is depleted "or that the present or future public convenience or necessity permit such abandonment."[7]

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[6] Some of the respondents herein filed a conditional cross-petition for a writ of certiorari seeking review with respect to these issues. The cross-petition was denied on June 16, 1975 (No. 74–1045).

[7] Section 7(b) provides:

"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

The court reasoned that Section 7(b) requires a finding by the Commission at the time of the proposed abandonment, not at the time of certification, that the abandonment is consistent with the public convenience or necessity. It stated (Pet. App. 20a–21a):

> Pregranted abandonment would leave a producer free to discontinue service to the interstate market, perhaps years after the original certification, with no contemporaneous obligation on the producer to justify withdrawal of service as consistent with the public convenience and necessity. We think Section 7(b) does not contemplate or authorize such procedure.
>
> * * * It appears to us * * * that pregranted abandonment requires more clairvoyance than even the Commission's expertise reasonably encompasses.

The court of appeals was "fortified in [its] conclusion" (*id.* at 21a) by its reading of this Court's decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, which upheld the Commission's authority to issue a certificate without time limitation to a producer who applied for a certificate limited in time to the duration of the underlying sales contract.

SUMMARY OF ARGUMENT

A. Under Section 7(b) of the Act, the Commission may approve an abandonment of service upon a finding either that the supply is depleted or that "the present or future public convenience or necessity permit such abandonment." Neither the language nor the purpose of the statute requires that the finding be

made at the time of the proposed abandonment rather than the time of certification. The Commission fulfills its statutory responsibility if it exercises proper control over the termination, as well as the initiation, of service. When to exercise that control is a matter left to the Commission's judgment.

Pre-granted abandonment may require the Commission to forecast future conditions in order to weigh the future public interest. But agencies commonly must apply their expertise in an effort to "forecast * * * the direction in which future public interest lies" (*Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29), and the courts, recognizing that any such prediction is fraught with uncertainty, give special deference to an agency's judgment about the future. There is no reason to assume that the Commission's forecasting under the optional certificate procedure will in every case be unreasonable, and there is consequently no justification for disapproving the pre-granted abandonment feature of this procedure on the basis of an abstract skepticism about the Commission's capacity to make reasoned judgments concerning the future. The time to test that capacity is when the Commission applies its judgment in individual cases.

Moreover, the Commission is not restricted to a narrow consideration of whether the gas will be needed for the interstate market after the proposed abandonment. When a producer's willingness to serve a particular interstate purchaser is conditioned upon his receiving advance assurance that the service may be terminated on a future date certain, it is within the

proper scope of the Commission's regulatory responsibility to consider whether the present need for the gas justifies giving the applicant the advance assurance requested.

That does not mean that the Commission will approve an abandonment simply because the producer would prefer to sell in the intrastate market. Though the producer's wish for a limited rather than unlimited commitment to the interstate market triggers the Commission's consideration of the request, the decision in every case will turn solely on the Commission's determination of the "present or future public convenience or necessity" under Section 7(b). The Act permits the Commission to employ its control over abandonment functionally to attract gas to the interstate market during the present critical shortage.

B. This Court's decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, supports the Commission's authority simultaneously to authorize the commencement and future termination of a sale of natural gas. The issue in that case was whether the Commission may properly issue a certificate of public convenience and necessity without limitation as to time, when the application sought only a certificate limited to a specified term of years. The Court held that the Commission was free to issue a certificate unlimited as to time, so long as it did so with the understanding that it was also free to issue a limited-term certificate.

The court of appeals in the present case erroneously read the *Sunray* decision as implying that the Act forbids the issuance of limited-term certificates. Since a

limited-term certificate is functionally and legally the equivalent of pre-granted abandonment, the court of appeals inferred that *Sunray* fortified the conclusion that pre-granted abandonment is improper.

Sunray in fact stands for the converse proposition. This Court's opinion in *Sunray* expressly characterizes as erroneous the notion that the Act precludes issuance of a limited-term certificate. The *Sunray* decision thus precludes, rather than fortifies, the decision of the court of appeals in the present case.

ARGUMENT

THE FEDERAL POWER COMMISSION HAS AUTHORITY UNDER THE NATURAL GAS ACT SIMULTANEOUSLY TO APPROVE BOTH THE INITIATION AND THE FUTURE ABANDONMENT OF INTERSTATE SALES OF NATURAL GAS BY PRODUCERS

The administrative order in this case established a procedure by which a producer may apply for, and the Commission (upon proper statutory findings) may issue, a certificate of public convenience and necessity simultaneously authorizing both the commencement of an interstate sale of natural gas and the termination of that sale on a future date certain. In setting aside the pre-granted abandonment feature of the Commission's order, the court of appeals held, in effect, that the Act would in no circumstances permit the Commission to authorize, at the time of certification, the future abandonment of a sale commenced under the optional certificate procedure.

That broad holding rests, we submit, upon a misinterpretation of this Court's decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, and upon the erroneous premise that the findings required for an abandonment must be made, and must relate to conditions as they exist, at the time of the proposed abandonment.

A. THE FINDINGS REQUIRED FOR THE COMMISSION'S APPROVAL OF AN ABANDONMENT UNDER SECTION 7(B) MAY PROPERLY BE MADE AT THE TIME OF CERTIFICATION AND MAY PROPERLY RELATE TO PRESENT AND FUTURE CONDITIONS AS THEY APPEAR TO THE COMMISSION AT THAT TIME

Section 7(b) of the Act, 15 U.S.C. 717f(b), provides that no natural gas company shall abandon any jurisdictional service or facility without the prior approval of the Commission after a hearing, and a finding either "that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." The court of appeals held that the findings required by Section 7(b) must be made at the time of the proposed abandonment rather than at the time of certification. It reasoned that Section 7(b) imposes upon a producer a "contemporaneous obligation * * * to justify withdrawal of service as consistent with the public convenience and necessity" (Pet. App. 20a), that the Act also contemplates a contemporaneous opportunity for judicial review of the administrative approval of abandonment (*id.* at 21a), and that the task of predicting, at the time of certification, what conditions will prevail at the time of a proposed future abandonment "requires more clairvoyance than even the Commission's expertise reasonably encompasses" (*ibid.*).

Nothing in the language or history of Section 7(b), however, supports the court's reasoning.

1. Abandonment may be predicated on a finding either that the gas supply is depleted or that "the present or future public convenience or necessity permit such abandonment" (15 U.S.C. 717f(b)). That determination, so far as the statutory language is concerned, can properly be made at the time of certification as well as at the time of the abandonment; Section 7(b) does not address the question of timing. Whenever the Commission approves (or disapproves) an abandonment, its action is subject to judicial review under Section 19(b) of the Act, 15 U.S.C. 717r (b). But neither that Section nor Section 7(b) implies that the opportunity for judicial review must be contemporaneous with the proposed withdrawal of service.

Thus, rather than imposing specific time requirements, Congress left it to the Commission to decide when to consider an abandonment application. Just as the statutory language is silent with respect to timing, the legislative history gives no support to the court of appeals' conclusion that consideration of an abandonment application may take place only at the time of the abandonment. The broad purpose of Section 7 (b)—to empower the Commission "to regulate the abandonment of service"[8]—is as fully served regardless of the stage at which the Commission exercises its control over the termination of service.

[8] H.R. Rep. No. 709, 75th Cong., 1st Sess. 2 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess. 2 (1937).

2. Nor should consideration of future abandonment be foreclosed at the time of certification on the ground that it requires "more clairvoyance than even the Commission's expertise reasonably encompasses" (Pet. App. 21a). Fulfillment of an agency's regulatory responsibilities frequently requires some forecasting of future circumstances, and the standard of Section 7 (b)—"the present or future public convenience or necessity"—plainly envisions such forecasting by the Commission in connection with abandonment applications. See *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28–29.

As this Court stated in connection with the nearly identical public interest standard of Section 7(e) of the Act, 15 U.S.C. 717f(e) ("present or future public convenience *and* necessity"), " a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency" (*Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp., supra,* 365 U.S. at 29). And where, as in the case of abandonments under Section 7(b), "[f]orecasts as to the future are necessary to the decision," this Court has been especially loath to interfere with the particular applications of an agency's expert judgment, lest "uncertainties as to the future" be permitted to "paralyze the Commission into inaction" (*United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241).

Order No. 455 does not authorize any future abandonment of service; it establishes a procedure by which the Commission may consider requests for such authorization. If, pursuant to that procedure, the

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Commission approves a future abandonment on the basis of its assessment of the conditions that are likely to prevail at the time of the abandonment, that assessment will be subject to judicial review on the basis of the record and the Commission's articulated "deductions" (*Transcontinental Gas Pipe Line Corp., supra*, 365 U.S. at 29).

Particularly in view of the Court's deference to an agency's reasoned forecasting, there is no reason to anticipate at this stage that the Commission's assessments of the future will be set aside as unreasonable. The time to test the Commission's "clairvoyance" is not now, when the question is hypothetical and abstract, but when the Commission actually authorizes abandonment in an optional certificate proceeding.

This Court has rejected as "premature" similar abstract challenges to Commission orders establishing a regulatory scheme. Since the opportunity for subsequent judicial review provides adequate protection against arbitrary agency action, any such "broadside" challenge to the regulatory program is properly deferred "until the Commission has applied its scheme in individual cases" (*Federal Power Commission* v. *Texaco Inc.*, 417 U.S. 380, 392).

Indeed, it was on this basis that the court of appeals in the present case correctly rejected an attack upon those provisions of Order No. 455 that provide for review and approval by the Commission of both an initial rate and any fixed rate escalations specified in the contract. Respondents had argued that it would be impossible for the Commission to determine in advance the reasonableness of future rate escalations.

The court's response to that argument, we think, effectively answers as well the similar contention that the Commission cannot possibly forecast the public interest in approving future abandonments (Pet. App. 13a–14a):

> We cannot say as an abstract proposition of law that it is impossible for the Commission to make an advance determination of "reasonableness" in proceedings under Section 4. Although as a practical matter one may be skeptical about the ability of the Commission to succeed in this endeavor, we think it may make the attempt. Whether it succeeds will depend upon the evidentiary basis for the escalations proposed in a given contract and the reasonableness of Commission findings and projections supporting and approving such escalations. The question is one of proof which can be answered only on a record setting out a particular proposal and the evidence supporting it.

3. The court of appeals' error with respect to the abandonment question, however, reflects an even more fundamental misconception concerning the nature of the public interest considerations that bear upon the Commission's responsibilities under Section 7(b). The supposition underlying the court's "clairvoyance" reasoning is that the public interest findings required for an abandonment under Section 7(b) must relate to the conditions that exist at or after the time of the proposed termination of service and cannot take account of the period between the certification and the abandonment. That supposition is inaccurate.

Although a depletion of supply ordinarily would

be relevant only if it occurred at the time of the proposed termination, the broader public interest considerations under Section 7(b) are not so limited. The statute does not confine the Commission to a narrow consideration of whether the gas is likely to be needed for the interstate market after the proposed abandonment. To the contrary, it "requires the Commission to evaluate all factors bearing on the public interest" (*Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 391), including the public need for the gas during the period *prior* to the proposed termination.

Particularly in view of the severity of the present natural gas shortage, and the prospect that its impact may eventually be softened through the combined effect of conservation, increased supply, and consumer conversion to alternate fuels, it is reasonable for the Commission to take special account of the short-term public convenience and necessity. It could reasonably conclude in a particular case that the present critical need for natural gas in the interstate market would justify giving advance permission to a producer to terminate service at a future date when the need might be less critical.

The Commission recognized in Order No. 455 that some producers may be unwilling to make an indefinite commitment to the interstate market and that otherwise available supplies were for that reason made unavailable to interstate consumers. The optional certificate procedure is designed in part to attract those supplies to the interstate market by permitting the Commission, in an appropriate case and

when the public interest would thereby be served, to give a producer advance assurance that his commitment will terminate on a date certain. To the extent that such pre-granted abandonment succeeds in attracting otherwise unavailable gas supplies to the interstate market now, it may well advance "the present or future public convenience or necessity" (15 U.S.C. 717f(b)), notwithstanding that the supplies may be available to interstate consumers for a limited rather than unlimited period.

The Commission's willingness to take account of commercial realities does not imply a departure from the statutory public interest standard. Nothing in Order No. 455 supports respondents' assertion that the Commission will authorize a producer to abandon the sale of gas to an interstate purchaser "simply because that producer would rather sell its gas in the unregulated, intrastate market" (APGA Br. in Opp. 5). The producer's desire for advance abandonment authority *triggers* the Commission's consideration of the request, but the decision whether to grant the request turns solely on the Commission's determination of the "present or future public convenience or necessity" under Section 7(b) (Pet. App. 55a).[9]

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[9] See, *e.g.*, *Belco Petroleum Corp.*, 49 FPC 1154, set aside and remanded on other grounds *sub nom. Consumers Union of United States, Inc.* v. *Federal Power Commission*, 510 F. 2d 656 (C.A.D.C.), where the Commission rejected a request for pregranted abandonment under the optional certificate procedure on the ground that the record would not support the necessary findings. The Commission there stated (49 FPC at 1181–1182):

"It is clearly within our power to make a present determination of depletion of supply over time and the require-

It is settled, of course, that the Commission is not required to authorize future termination of service merely because the producer requests such authorization in its application for a certificate. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137. It is also clear that the Commission is not required to approve abandonment of a previously certificated sale merely because the producer would prefer to serve the intrastate market. See *Michigan Consolidated Gas Co.* v. *Federal Power Commission,* 283 F. 2d 204, 214 (C.A.D.C.), certiorari denied *sub nom. Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.,* 364 U.S. 913.

But when an application for a certificate under the optional procedure established by Order No. 455 is conditioned upon advance authorization of future discontinuance—that is, when the producer agrees to serve a particular interstate purchaser for a specified term of years only if it is assured that its commitment may be terminated on a date certain [10]—it is

ments of the present or future public convenience and necessity, given an adequate record. We have no factual basis for exercise of abandonment authority here, however, and Belco's application is therefore denied."

See also *Pennzoil Co.*, 50 FPC 977, 990.

[10] If, for example, a producer discovers and develops a new supply of natural gas and enters into a contract to sell that gas to a specific purchaser commencing at a future date, he may be willing and able to sell the gas in the interim period to another interstate purchaser but only if he is assured that he may discontinue the interim sale at the end of the contract term so that he can fulfill his future contractual obligation to the original purchaser. See, *e.g.*, *Tenneco Oil Co.*, FPC Dkt. No. C175-104 (order issued October 21, 1974).

within the proper scope of the Commission's authority to weigh the public need for the gas during the specified term, and to determine whether that need justifies giving the applicant the advance assurance requested. To deny that the present need for gas is a proper element of the public convenience and necessity in the context of abandonment would be to deprive the Commission of an essential tool for attracting needed incremental gas supplies to the interstate market during the current period of acute shortage, a result that would be at odds with the overriding statutory purposes.

Just as the Commission may, in the exercise of its rate review responsibilities, "employ price functionally in order to achieve relevant regulatory purposes" (*Permian Basin Area Rate Cases,* 390 U.S. 747, 797), including the purpose of enhancing the supply of natural gas available to interstate consumers, so too may it employ its control over abandonment functionally to attract gas to the interstate market. Nothing in the Act forbids a functional approach to abandonment authorizations if, as here, the Commission reasonably finds that such an approach is "necessary or appropriate to carry out the provisions of this Act" (15 U.S.C. 717*o*). See *Permian Basin, supra,* 390 U.S. at 797.

Here, as in other contexts, "the Commission's broad responsibilities * * * demand a generous construction of its statutory authority" (*id.* at 776). Moreover, "[a] presumption of validity * * * attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake

'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences'" (*id.* at 767). Respondents have not met that burden in this case.

B. THIS COURT'S *SUNRAY* DECISION ESTABLISHES THAT THE COMMISSION MAY PROPERLY AUTHORIZE TERMINATION OF SERVICE AT THE SAME TIME THAT IT CERTIFICATES THE SERVICE

The court of appeals rested its decision in this case in part upon this Court's decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137. The court of appeals thought that *Sunray* "fortified" the conclusion that the Commission may authorize a termination of service only at the time of the termination (Pet. App. 21a). As we read *Sunray,* it stands for the opposite proposition: that the Commission, at the time it issues a certificate for the sale of natural gas, has authority simultaneously to approve the future termination of the service.

The *Sunray* decision was the culmination of several rounds of litigation involving the same company. In *Sunray Mid-Continent Oil Co.* v *Federal Power Commission,* 239 F. 2d 97 (C.A. 10), reversed on other grounds, 353 U.S. 944 (hereinafter *Sunray I*), a natural gas producer sought certificates authorizing sales in interstate commerce and requested that the certificates be limited in time to expire coextensively with the terms of the underlying contracts. The Commission issued the certificates but refused to limit them as to time, taking the position that termination of the service could be authorized only in a proceeding initiated under Section 7(b) of the Natural Gas Act and

that the Commission lacked authority to issue a limited-term certificate in a certification proceeding initiated under Section 7(c) (see 14 FPC 877).

The Tenth Circuit held, however, that the Commission's power under Section 7(e) of the Act, 15 U.S.C. 717f(e),[11] to attach reasonable conditions to its certificate authorizations includes the power "in a proper case * * * [to] grant certificates of convenience and necessity for periods of limited duration" (239 F. 2d at 100). Moreover, contrary to the holding of the court of appeals in the present case, the Tenth Circuit concluded that Section 7(b) is no bar to authorizing future termination of service at the same time that the service itself is authorized. "Section 7(b) is clearly not intended to be a restriction upon the powers granted in Section 7(c) and 7(e)" (*id.* at 101).[12]

Subsequently, in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 267 F. 2d 471 (C.A. 10) (*Sunray II*), the same court held that, while the Commission has authority to issue limited-term certificates, it is not required to do so. The Commission may

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[11] The provisions of Section 7(e) are set forth at p. 31, *infra.*

[12] The Tenth Circuit affirmed the Commission's refusal to limit the certificate as to time, however, because the producer's application did not make an adequate showing that such a condition was required by the public convenience and necessity. This Court thereafter reversed solely on the ground that, once the court of appeals had determined that the Commission had authority to issue certificates limited as to time, it should have remanded the case to the Commission rather than deciding itself whether the producer was entitled to such a certificate (353 U.S. 944).

properly issue certificates without limitation as to time, even when the producer's application seeks only a limited-term certificate permitting termination of service at the expiration of the underlying contract.

The decision of the Tenth Circuit in *Sunray II* was affirmed by this Court in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137. This Court stated (364 U.S. at 142):

> If petitioner's contentions, as to the want of authority in the Commission to grant a permanent certificate where one of limited duration has been sought for, were to be sustained, the way would be clear for every independent producer of natural gas to seek certification only for the limited period of its initial contract with the transmission company, and thus automatically be free at a future date, untrammeled by Commission regulation, to reassess whether it desired to continue serving the interstate market.

It was this sentence that the court of appeals in the present case quoted in support of its conclusion that the Commission lacks authority to authorize future abandonment at the time of certification. The court of appeals was correct in thinking that a permanent certificate with pre-granted abandonment is legally and functionally identical to a limited-term certificate. In either case, the Commission determines at the time of certification that the present or future public convenience and necessity, as perceived by the Commission at that time, warrant the issuance of a certificate that permits the future discontinuance of service under it

on a date certain without need for further proceedings. But the court erroneously inferred from this Court's opinion in *Sunray* that a limited-term certificate would be barred by the Act.

Quite the contrary is true. This Court specifically endorsed in its *Sunray II* opinion the Tenth Circuit's holding in *Sunray I* that the Commission was authorized to issue certificates limited as to time. "There is," this Court stated, "no contention that the Commission was again indulging in *the erroneous notion that it had no power to issue a limited certificate*. Cf. *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 239 F. 2d 97, reversed on other grounds, 353 U.S. 944" (364 U.S. at 157; emphasis added).

The court of appeals in the present case thus misread this Court's opinion in *Sunray II*. Far from implying that the Act *forbids* the issuance of a limited-term certificate, the Court expressly adopted the view that the Act *permits* the issuance of such a certificate. Indeed, the holding in *Sunray II* was that the Commission could issue a certificate without a limited term, so long as it did so with recognition that the Act also permits, in a proper case, the issuance of a certificate *with* a limited term.

This Court's decision in *Sunray II* therefore contradicts, rather than fortifies, the court of appeals' conclusion in the present case. It establishes, contrary to the ruling of the court of appeals, that the Commission does have authority to approve the future termination of service on the basis of public interest

considerations as perceived by the Commission at the time of certification.[13]

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it set aside the pre-granted abandonment provision of Order No. 455, and the case should be remanded to that court with directions to enter a judgment of affirmance.

Respectfully submitted.

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[13] It is no answer to suggest (see APGA Br. in Opp. 2–4) that "long-term" sales should be in a different category. The proposed sale in *Sunray I* was for a primary term of 10 years (239 F. 2d at 98); in *Sunray II* it was for a term of 20 years (364 U.S. at 139). As those decisions demonstrate, the length of the underlying service contract has no bearing on the Commission's authority under Section 7(b) simultaneously to authorize both the initiation and the future termination of a jurisdictional sale, although the length of the term might, in a particular case, influence the Commission's willingness to exercise that authority.

APPENDIX

The Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717, *et seq.*, provides in pertinent part:

Section 4, 15 U.S.C. 717c:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and

charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but

not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5, 15 U.S.C. 717d:

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any

rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Section 7, 15 U.S.C. 717f:

CONSTRUCTION, EXTENSION, OR ABANDONMENT OF FACILITIES; CERTIFICATE OF CONVENIENCE AND NECESSITY; CONDEMNATION PROCEEDINGS

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it

may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commis-

sion authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner

of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: ***Provided,*** That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Section 16, 15 U.S.C. 717o:

ADMINISTRATIVE POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commis-

sion shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

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